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10 Attorneys for Plaintiff,

11 **UNITED STATES DISTRICT COURT**

12 **NORTHERN DISTRICT OF CALIFORNIA**

13 JOSEPH MICHAEL TREJO, on behalf
14 of himself, all others similarly situated,

15 *Plaintiff,*

16 vs.

17 SIMMONS BEDDING COMPANY,
18 LLC., A Delaware Limited Liability
19 Company; and DOES 1-50, inclusive,

20 *Defendants.*

Case No.:

CLASS ACTION

COMPLAINT FOR:

1. Violation of 15 U.S.C. §§
1681b(b)(2)(A) and 1681d(a)
(Fair Credit Reporting Act); and

JURY TRIAL DEMANDED

21
22
23 Plaintiff, JOSEPH MICHAEL TREJO (hereafter "Plaintiff"), on behalf of
24 himself and all others similarly situated, complains and alleges as follows:

25 **INTRODUCTION**

26
27 1. Plaintiff brings this class and representative action against defendants
28 SIMMONS BEDDING COMPANY, LLC, A DELAWARE LIMITED
LIABILITY COMPANY ("SIMMONS"), and Does 1-50, inclusive (collectively

1 “Defendants”) for alleged violations of the Fair Credit Reporting Act (“FCRA”).

2 2. Plaintiff alleges that Defendants routinely acquire consumer,
3 investigative consumer and/or consumer credit reports (referred to collectively as
4 “credit and background reports”) to conduct background checks on Plaintiff and
5 other prospective, current and former employees and use information from credit
6 and background reports in connection with their hiring process without complying
7 with the law. Plaintiff, individually and on behalf of all others similarly situated
8 current, former, and prospective employees, seeks compensatory and punitive
9 damages due to Defendants’ systematic and willful violations of the FCRA, 15
10 U.S.C. §§ 1681 *et seq.*

11 PARTIES

12 5. Defendants employed Plaintiff in in the State of California.

13 6. Simmons is a corporation organized and existing under the laws of
14 Delaware and also a citizen of California based on Plaintiff’s information and
15 belief.

16 7. Plaintiff is ignorant of the true names, capacities, relationships, and
17 extents of participation in the conduct alleged herein, of the defendants sued as
18 DOES 1-50, inclusive, but is informed and believes and thereon alleges that said
19 defendants are legally responsible for the wrongful conduct alleged herein and
20 therefore sues these defendants by such fictitious names. Plaintiff will amend the
21 Complaint to allege the true names and capacities of the DOE defendants when
22 ascertained.

23 8. Plaintiff is informed and believes and thereon alleges that, at all
24 relevant times herein, all Defendants were the agents, employees and/or servants,
25 masters or employers of the remaining defendants, and in doing the things
26 hereinafter alleged, were acting within the course and scope of such agency or
27 employment, and with the approval and ratification of each of the other
28

1 Defendants.

2 9. At all relevant times, in perpetrating the acts and omissions alleged
3 herein, Defendants, and each of them, acted pursuant to and in furtherance of a
4 policy, practice, or a lack of a practice which resulted in Defendants not paying
5 Plaintiff and other members of the below-described class in accordance with
6 applicable laws as alleged herein.

7 10. Plaintiff is informed and believes and thereon alleges that each and
8 every one of the acts and omissions alleged herein were performed by, and/or
9 attributable to, all Defendants, each acting as agents and/or employees, and/or
10 under the direction and control of each of the other defendants, and that said acts
11 and failures to act were within the course and scope of said agency, employment
12 and/or direction and control.

13 CLASS ALLEGATIONS

14 11. This action has been brought and may be maintained as a class action
15 pursuant to FRCP §23 because there is a well-defined community of interest
16 among the persons who comprise the readily ascertainable classes defined below
17 and because Plaintiff is unaware of any difficulties likely to be encountered in
18 managing this case as a class action.

19 12. **Class Definitions:** The classes are defined as follows:

20 A. **FCRA Class:** All of Defendants' current, former and
21 prospective applicants for employment in the United States who applied for a job
22 with Defendants at any time during the period beginning five years prior to the
23 filing of this action and ending on the date that final judgment is entered in this
24 action.

25 13. **Reservation of Rights:** Pursuant to Rule of Court 3.765(b), Plaintiff
26 reserves the right to amend or modify the class definitions with greater specificity,
27 by furthsd division into subclasses and/or by limitation to particular issues.
28

1 14. **Numerosity:** The class members are so numerous that the individual
2 joinder of each individual class member is impractical. While Plaintiff does not
3 currently know the exact number of class members, Plaintiff is informed and
4 believes that the actual number exceeds the minimum required for numerosity
5 under California law.

6 15. **Commonality and Predominance:** Common questions of law and
7 fact exist as to all class members and predominate over any questions which affect
8 only individual class members. These questions include, but are not limited to:

9 A. Wherein Defendants willfully failed to provide the class with
10 stand-alone written disclosures before obtaining a credit or background report in
11 compliance with the statutory mandates?

12 B. Wherein Defendants willfully failed to comply with the
13 FCRA?
14

15 16. **Typicality:** Plaintiff's claims are typical of the other class members'
16 claims. Plaintiff is informed and believes and thereon alleges that Defendants have
17 a policy, practice or a lack of a policy which resulted in Defendants failing to
18 comply with the California Labor Code, and the Business and Professions Code,
19 and FCRA as alleged herein.

20 17. **Adequacy of Class Representative:** Plaintiff is an adequate class
21 representative in that he has no interests that are adverse to, or otherwise in
22 conflict with, the interests of absent class members. Plaintiff is dedicated to
23 vigorously prosecuting this action on behalf of class members. Plaintiff will fairly
24 and adequately represent and protect the interests of class members.

25 18. **Adequacy of Class Counsel:** Plaintiff's counsel are adequate class
26 counsel in that they have no known conflicts of interest with Plaintiff or absent
27 class members, are experienced in class action litigation and are dedicated to
28 vigorously prosecuting this action on behalf of Plaintiff and absent class members.

19. **Superiority:** A class action is vastly superior to other available means for fair and efficient adjudication of class members' claims and would be beneficial to the parties and the Court. Class action treatment will allow a number of similarly situated persons to simultaneously and efficiently prosecute their common claims in a single forum without the unnecessary duplication of effort and expense that numerous individual actions would entail. In addition, the monetary amounts due to many individual class members are likely to be relatively small and would thus make it difficult, if not impossible, for individual class members to both seek and obtain relief. Moreover, a class action will serve an important public interest by permitting class members to effectively pursue the recovery of monies owed to them. Further, a class action will prevent the potential for inconsistent or contradictory judgments inherent in individual litigation.

FIRST CAUSE OF ACTION

FAILURE TO MAKE PROPER DISCLOSURE IN VIOLATION OF THE FCRA

(15 U.S.C. §§ 1681b(b)(2)(A) and 1681d(a))

(By Plaintiff and the FCRA Class against all Defendants)

20. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

21. Defendants are "persons" as defined by Section 1681a(b) of the FCRA.

22. Plaintiff and class members are "consumers" within the meaning Section 1681a(c) of the FCRA, because they are "individuals."

23. Section 1681a(d)(1) of the FCRA defines "consumer report" as any oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is

used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility" for employment purposes.

Thus a credit and background report qualifies as a consumer report.

24. Section 1681a(e) of the FCRA defines "investigative consumer report" as:

a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with whom he is acquainted or who may have knowledge concerning any such items of information.

Thus a credit and background report qualifies as an investigative consumer report.

25. Section 1681b(b) of the FCRA provides, in relevant part:

Conditions for furnishing and using consumer reports for employment purposes

(2) Disclosure to consumer

(A) In general

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

- i. **a clear and conspicuous** disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that **consists solely of the disclosure**, that a consumer report may be obtained for employment purposes; and
- ii. the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person. (Emphasis Added).

26. Section 1681d(a) provides, in relevant part:

Disclosure of fact of preparation

A person may not procure or cause to be prepared an investigative consumer report on any consumer unless—

(1) it is *clearly and accurately disclosed* to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure

(A) is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and

(B) *includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section and the written summary of the rights of the consumer prepared pursuant to section 1681g(c) of this title; (Emphasis Added.)*

27. Plaintiff alleges, on information and belief, that in evaluating him and other class members for employment, Defendants procured or caused to be prepared credit and background reports (i.e., a consumer report and/or investigative consumer report, as defined by 15 U.S.C. § 1681a(d)(1)(B) and 15 U.S.C. § 1681a(e)).

28. While Plaintiff worked for Defendants, Defendants required him and the putative class to fill out and sign two different authorization forms to allow Defendant to procure credit reports on the putative class.

29. Because the purported disclosures are embedded with extraneous information, and are not clear and unambiguous disclosures in stand-alone

1 documents, they do not meet the requirements under the law.

2 29. Under the FCRA, it is unlawful to procure or caused to be procured,
3 consumer report or investigative consumer report for employment purposes unless
4 the disclosure is made in a document that consists solely of the disclosure and the
5 consumer has authorized, in writing, the procurement of the report. 15 U.S.C. §
6 1681b(b)(2)(A)(i)-(ii). The inclusion of other extraneous information, therefore,
7 violates § 1681b(b)(2)(A) of the FCRA.
8

9 30. Although the disclosure and the authorization may be combined in a
10 single document, the Federal Trade Commission (“FTC”) has warned that the
11 form should not include any extraneous information or be part of another
12 document. For example, in response to an inquiry as to whether the disclosure
13 may be set forth within an application for employment or whether it must be
14 included in a separate document, the FTC stated:

15 The disclosure may not be part of an employment application
16 because the language [of 15 U.S.C. § 1681b(b)(2)(A) is]
17 intended to ensure that it appears conspicuously in a document
18 not encumbered by any other information. The reason for
19 requiring that the disclosure be in a stand-alone document is to
20 prevent consumers from being distracted by other information
side-by-side within the disclosure.

21 31. Additionally, the inclusion of the extraneous provisions causes the
22 disclosure to fail to be “clear and conspicuous” and “clear[] and accurate[],” and
23 thus violates §§ 1681b(b)(2)(A) and 1681d(a).

24 32. Based upon the facts likely to have evidentiary support after a
25 reasonable opportunity for further investigation and discovery, Defendants have a
26 policy and practice of failing to provide adequate written disclosures to applicants
27 and employees, before procuring consumer reports or causing consumer reports to
28 be procured. Pursuant to that policy and practice, Defendants procured consumer

1 reports or caused consumer reports to be procured for Plaintiff and class members
2 without first providing a written disclosure in compliance with Section
3 1681b(b)(2)(A) of the FCRA.

4 33. Defendants' conduct in violation of Section 1681b(b)(2)(A) of the
5 FCRA was and is willful. Defendants acted in deliberate or reckless disregard of
6 their obligations and the rights of applicants and employees, including Plaintiff
7 and class members. Defendants' willful conduct is reflected by, among other
8 things, the following facts:

9 (a) Defendants are a large corporation with access to legal advice;

10 (b) Defendants required a purported authorization to perform
11 credit and background checks in the process of employing the class members
12 which, although defective, evidences Defendants' awareness of and willful failure
13 to follow the governing laws concerning such authorizations;

14 (c) The plain language of the statute unambiguously indicates that
15 inclusion of a liability release and other extraneous information in a disclosure
16 form violates the disclosure and authorization requirements; and

17 (d) The FTC's express statements, pre-dating Defendants'
18 conduct, which state that it is a violation of Section 1681b(b)(2)(A) of the FCRA
19 to include a liability waiver in the FCRA disclosure form.

20 34. On information and belief and based upon the facts likely to have
21 evidentiary support after a reasonable opportunity for further investigation and
22 discovery, Defendants have a policy and practice of procuring investigative
23 consumer reports or causing investigative consumer reports to be procured for
24 applicants and employees without providing a written summary of their rights
25 under the FCRA at the same time as the disclosure explaining that an investigative
26 consumer report may be made. Pursuant to that policy and practice, Defendants
27 procured investigative consumer reports or caused investigative consumer reports
28

1 to be procured for Plaintiff and class members, without providing a timely written
2 summary of their rights under the FCRA.

3 35. Accordingly, Defendants willfully violated and continue to violate
4 the FCRA including, but not limited to, §§ 1681b(b)(2)(A) and 1681d(a).
5 Defendants' willful conduct is reflected by, among other things, the facts set forth
6 above.

7 36. As a result of Defendants' illegal procurement of credit and
8 background reports by way of their inadequate disclosures, as set forth above,
9 Plaintiff and class members have been injured including, but not limited to, having
10 their privacy and statutory rights invaded in violation of the FCRA.

11 37. Plaintiff, on behalf of himself and all class members, seeks all
12 available remedies pursuant to 15 U.S.C. § 1681n, including statutory damages
13 and/or actual damages, punitive damages, injunctive and equitable relief and
14 attorneys' fees and costs.

15 38. In the alternative to Plaintiff's allegation that these violations were
16 willful, Plaintiff alleges that the violations were negligent and seeks the
17 appropriate remedy, if any, under 15 U.S.C. § 1681o, including actual damages
18 and attorneys' fees and costs.

19
20 **PRAYER FOR RELIEF**

21 WHEREFORE, Plaintiff, on behalf of himself and all others similarly
22 situated, prays for relief and judgment against Defendants as follows:

- 23 A. An order that the action be certified as a class action;
24 B. An order that Plaintiff be appointed class representative;
25 C. An order that counsel for Plaintiff be appointed class counsel;
26 D. Statutory penalties;
27 E. Civil penalties;
28 F. Punitive damages;

1 G. Costs of suit;

2 H. Interest;

3 I. Reasonable attorneys' fees; and

4 J. Such other relief as the Court deems just and proper.

5 **DEMAND FOR JURY TRIAL**


6 Plaintiff, on behalf of himself and all others similarly situated, hereby
7 demands a jury trial on all issues so triable.
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9
10 Respectfully submitted,

11 Dated: April 21, 2015

12 SETAREH LAW GROUP

13 By

14 
15 SHAUN SETAREH, Attorney for
16 Plaintiff, JOSEPH MICHAEL TREJO,
17 on behalf of himself, all others similarly
18 situated
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